

UNILATERAL MAN HUNTING: IS THE STRATEGIC OPERATING
ENVIRONMENT STRUCTURED TO ALLOW THE DEPARTMENT
OF DEFENSE TO CONDUCT UNILATERAL
MAN-HUNTING OPERATIONS

A thesis presented to the Faculty of the U.S. Army
Command and General Staff College in partial
fulfillment of the requirements for the
degree

MASTER OF MILITARY ART AND SCIENCE
General Studies

by

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Fort Leavenworth, Kansas
2004

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MASTER OF MILITARY ART AND SCIENCE

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ABSTRACT

UNILATERAL MAN HUNTING: IS THE STRATEGIC OPERATING ENVIRONMENT STRUCTURED TO ALLOW THE DEPARTMENT OF DEFENSE TO CONDUCT UNILATERAL MANHUNTING OPERATIONS, by MAJ Steven J. Roberts, 78 pages.

The Department of Defense changed its strategic focus after the tragedies of 11 September 2001. As the smoke and information cleared, a global campaign against the terrorist organizations that committed that horrific act was initiated, with the sole intent of bringing security back to the homeland. Cold War era policy and legislative structure, however, reminded military leadership that unilateral operations are not easily accomplished under current legislative and policy guidance. Analysis, however, shows that much of what is accepted as guidance comes through policy and historic precedence versus formal legislation. Using current US law and Presidential Policy, this study attempts to dissect existing guidance regarding three primary areas required at the macro level for mission success; access to intelligence, access to operating areas, and authority to conduct operations. Current legislation provides a framework for interagency cooperation while it establishes firewalls to limit the unilateral capability of any single element. The President, however, has the authority to clarify this legislation and shape the strategic environment for his subordinate elements through the use of Presidential Policy tools such as the executive order.

TABLE OF CONTENTS

	Page
MASTER OF MILITARY ART AND SCIENCE THESIS APPROVAL PAGE	ii
ABSTRACT	iii
ACRONYMS	vi
TABLE	vii
CHAPTER 1. INTRODUCTION	1
The Problem	2
Research Question and Focus	4
Key Terms	5
Limitations	7
Methodology	8
How is this Relevant?	12
CHAPTER 2. LITERATURE REVIEW	14
CHAPTER 3. LEGISLATIVE STRUCTURE AND FRAMEWORK	20
Introduction	20
United States Code--Specified Tasks	24
Access to Intelligence	25
<i>Title 10, Armed Forces</i>	25
<i>Title 12, Banks and Banking and Title 15, Commerce and Trade</i>	27
<i>Title 18, Crimes and Criminal Procedure</i>	28
<i>Title 21, Food and Drugs</i>	29
<i>Title 22, Foreign Relations and Intercourse</i>	29
<i>Title 49, Transportation</i>	30
<i>Title 50, War and National Defense</i>	30
Access to Intelligence--Summary	34
Access to Operating Areas	37
<i>Title 10, Armed Forces</i>	37
<i>Title 22, Foreign Relations and Intercourse</i>	37
Access to Operating Areas--Summary	37
Authority to Conduct Operations	38
<i>Title 10, Armed Forces</i>	38
<i>Title 18, Crimes and Criminal Procedure</i>	39
<i>Title 22, Foreign Relations and Intercourse</i>	39
<i>Title 50, War and National Defense</i>	41
Authority to Conduct Operations--Summary	41

CHAPTER 4. PRESIDENTIAL LAWMAKING	43
CHAPTER 5. SUMMARY AND RECOMMENDATION	55
Recommendation	61
GLOSSARY	65
REFERENCE LIST	66
INITIAL DISTRIBUTION LIST	69
CERTIFICATION FOR MMAS DISTRIBUTION STATEMENT	70

ACRONYMS

CIA.	Central Intelligence Agency
COM	Chief of Mission
DCI	Director, Central Intelligence.
DEA	Drug Enforcement Agency
DOD	Department of Defense
DOS	Department of State
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
HUMINT	Intelligence Through Human Sources
NFIP	National Foreign Intelligence Program
NSC	National Security Council
PDD	Presidential Decision Directive
SECDEF	Secretary of Defense
SECSTATE	Secretary of State
US	United States
<i>USC</i>	<i>United States Code</i>

TABLE

	Page
Table 1. Executive Order Usage	46

CHAPTER 1

INTRODUCTION

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.

Americans are asking: How will we fight and win this war? We will direct every resource at our command--every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war--to the disruption and to the defeat of the global terror network.

These measures are essential. But the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows.

President George W. Bush
Address to a Joint Session of Congress and the American People

This statement set the stage for the global war on terror as a multilateral war using all elements of national power. This approach could bring the entirety of the United States (US) infrastructure into the conflict fighting in whatever niche that element controlled and created the foundation for the first total war of the twenty-first century; it also created the foundation for an interagency conflict over who would have the lead and subsequent control. The real challenges were just beginning as overlapping jurisdictions and conflicting purposes and priorities began to reemerge into the forefront of day-to-day activities at the interagency level. Nowhere was this more evident than as the Department of Defense (DOD) began to plan operations targeted against individual terrorist leaders located across the globe.

The largest problems became those of perspective. Where did the role of the Defense Department fit with regard to other agencies--also operating with clearly defined

roles and responsibilities? Which Department or Agency had the lead for this conflict? It was a war, therefore it should be the Defense Department exercising the lead with the other elements of national power supporting the main effort; or should it? Semantics became the tool of debate as each element turned to legislation and current policy guidance to show why they should be the lead for their niche, and that, in effect, nothing should change.

The Defense Department also struggled inside the current strategic framework to execute their assigned mission. Legislation and national policy are the foundation for argument in this interagency struggle and have been the focus of debate as to the limits of authority for each individual branch or element, specifically in regard to the other elements of national power. The purpose of this thesis is to examine each of those (policy and legislation) in regard to the Defense Department and its approach toward conducting operations to remove individual terrorist leaders, and to disrupt planned and potential operations.

The Problem

The global war on terror has changed the operational realities of the DOD as it focuses on reorienting itself to face an old enemy with a new focus and priority. Historically, the US has faced the threat of terrorism by defending itself and its interests through passive means (barriers and security) and by deterring state actors through coercive diplomacy, threat of economic sanctions, and potential force of arms. This approach is evidenced repeatedly, through multiple administrations, in the form of policy documents such as Presidential Policy Document (PPD) 39, economic sanctions such as those against Iraq and Iran, diplomatic isolation against Syria and North Korea, through

the threat of force like the continual Carrier Battle Group presence in the Persian Gulf since the Iranian Revolution, and through the limited use of military force such as the F-111 bombing of Libya and the missile strikes against Sudan and Afghanistan. This changed on 11 September 2001 when the reality of terrorism struck US shores with dramatic impact. The events refocused the national will and moved transnational terrorist actors to primacy as a national threat. This shift offers significant challenges to DOD and the other executive branches and agencies responsible for defending the US and its interests. Specifically, how does one attack an enemy that does not recognize borders, or conform to other perspectives of national or state identity? This has caused the DOD to change its approach from focusing assets and capability against potential state actors, to specific individuals.

Identifying and removing designated hostile individuals have been responsibilities for the DOD since the American expansion west led to hunting regional threats and actors to facilitate the expansion. This has continued since, from the hunt for Poncho Villa to Augusto Sandino to Manuel Noriega. Each of these were accomplished as a secondary effort of the DOD, or were focused at the unit level while larger elements of DOD continued to conduct operations in support of other national strategic and operational objectives. This focus changed after 11 September when the hunt for individuals became the primary focus, and other strategic and operational objectives became secondary.

Transnational actors offer many problems from a targeting perspective. Their logistical infrastructure is amorphous and ambiguous; their operational elements are small and hidden; and their operational security routinely exceeds anything that could be accomplished by a state actor. All of these aspects, however, merge at the groups'

leadership. Funding, resource availability, sanctuary, and recruiting are all tied to their leadership and the leaders' ability to set the stage for success, making the leaders the decisive point for successfully attacking the organization. The obvious question is: How?

Research Question and Focus

Operations to remove key terrorist leaders require an operational and strategic framework to set the stage for potential success. This framework is defined for the DOD through legislation and policy established at the national level. This takes many forms; from formal legislation (including *United States Code (USC), Titles 10 and 50*) to policy established from formal executive level directives, as well as the precedence of past relationships and operational parameters. The legislation is not difficult to determine. The challenge becomes differing between the policy as dictated by formal directive and that which has been implied from precedence and interpretation of current legislation by the various agencies involved. The intent of this thesis is to identify that which is truly directive versus that which is implied or assumed through precedence.

To limit the scope of debate, the framework examined will be limited to that which is relevant to the primary question: Does the current operational and strategic framework permit the DOD to conduct unilateral man-hunting operations? This question can easily be dissolved into several focused areas based on the basic methodology described below. First, does DOD have access to the intelligence architecture that would allow it to identify potential targets and their locations? Second, does DOD have access to those areas of potential operations? Third, does DOD have the authority to conduct unilateral operations? And lastly, is the US government willing to accept the risk (defined later in this chapter) of DOD unilateral operations? These questions define the potential

for success of DOD operations. If these questions are not answered positively, then the potential for success for the DOD conducting unilateral operations is negated.

Once the realities of the operational and strategic framework are identified, then the potential for changing or clarifying existing guidance exists. There are multiple avenues to this change. The first is to approach it from a legislative perspective and change laws that constrain potential operations. This is only applicable if it is the law that prohibits operations and would constitute a long, politically-charged effort that may or may not be successful. If it is not law but is policy or precedence that restricts operations, that can be reshaped through the National Security Council (NSC) and the president. The true power of the president through the NSC and the application of presidential directives, findings, and others is discussed in depth in chapter 4 of this document.

Key Terms

Risk is a common term used throughout the military. The official definition as listed in FM 101-5-1 is the “[c]hance of hazard or bad consequences; exposure to chance of injury or loss. Risk level is expressed in terms of hazard probability or severity” (Department of the Army 1997, 1-141). The terms consequences and chance of loss warrant further expansion for this argument. The term risk includes more than the simple physical risks associated with an operation, but also includes the second and third order effects that come from those operations, including the impact on other national interests. The focus above has been on domestic limitations and constraints. Obviously, there are significant concerns regarding international law, as well as world opinion regarding potential unilateral operations of any sort. Unfortunately (or fortunately), there are no globally accepted rules or norms that are binding to sovereign states except those in

which the state elects to be bound in accordance with its national interest. As such, each action of a sovereign state is subject to international perspective as it applies to each state's national interest. Therefore, acting unilaterally carries a risk, from an international opinion perspective, with potentially real repercussions in the form of the new World Court, loss of bargaining power in the United Nations, loss of potential coalition support for other operations, and others. This risk does not grow or diminish based upon the success of operations, as some states will see the act itself as a violation of international law. Other states will see it as a violation of sovereignty, and others yet will claim it as an act of state sponsored terrorism. All of these constitute a risk to the sitting administration, as well as broader national interests. Domestically, the same issues can be raised. There is also the real potential for the loss of American lives in the conduct of these operations, the potential for collateral damage during the conduct of operations, as well as potential repercussions from terrorist organizations. Inaction also carries a real risk. As evidenced by the catastrophe of 11 September, doing nothing, or not doing enough, creates an environment where terrorist organizations are able to recruit, train, plan, and execute operations of devastating impact at a time and place of their choosing. As stated by the President in recent statements, a defensive posture is also problematic as the US must be correct in its intelligence and defensive measures 100 percent of the time where the terrorists only have to be successful once (The White House 2004). Leadership (civil and military) must weigh each of these factors and a decision must be made as to the relative risk of action versus inaction at each level. The challenge is to have the decision made early enough so that operational timing can be determined by the opportunity to act

against the enemy, versus the decision cycle of institutional leadership. All of this is included in the term risk as it is used in this thesis.

Success is a challenging term for this discussion. For the purpose of this argument, success is defined by establishing a strategic and operational framework that would allow for the potential for tactical success. The functional realities of operations designed to locate and remove specific individuals are that of extreme challenge for the tactical elements designated as responsible for operations. Creating a strategic and operational environment conducive for operations is a critical step in establishing the potential for their success. It does not guarantee tactical success; however, failing to establish the appropriate strategic environment will guarantee a lack of success.

Limitations

The dominant limitation on this thesis will be the classification level. The majority of *USC* and some presidential policy documents are unclassified. Some of the classified guidance and policy has included an unclassified synopsis of intent and purpose that has been officially released from the administration or Congress. This constitutes the foundation of the ensuing discussion as it establishes the strategic framework necessary for each department and agency to conduct its intended operations within the national security paradigm.

This thesis focuses on the strategic “how” of conducting unilateral DOD operations, not the “why.” Legislation, policy, and precedence can be changed, as required, to conduct operations should there exist adequate desire and impetus. The decision as to whether unilateral operations is the correct approach or if interagency

partnership is the correct answer, or even if another executive agency should have the lead for all operations, is beyond the scope of this missive and will not be addressed.

This thesis will also avoid the issues of how, tactically, the DOD conducts the war on terror. Tactics, techniques, and procedures vary depending upon the element conducting operations as well as the environment and opportunity presented.

Additionally, a formal discussion of the potential tactical actions can reduce their effectiveness as well as put the elements conducting the operations at increased risk.

Internal lines of command, control, and communication as well as the relationship of various combatant commanders and their geographic regions are also beyond the scope of this discussion but bear consideration for further research and debate.

Lastly, this thesis will avoid considerations of international law. A large body of parameters, that are often considered international law, exist that provide significant limitations upon the potential for operations by any given agency. Some of those have been codified in treaties and conventions and have subsequently been absorbed into formal legislation. Others are considered customary practices and are often quoted in the United Nations and elsewhere as the reason for a certain action or inaction. This customary realm is beyond the scope of this thesis and will not be considered beyond the ambiguous role it plays in defining risk as discussed above. Issues that are defined in Treaty or Convention, however, do have a direct influence on national decision making and will be discussed as they have been incorporated into *USC* and policy.

Methodology

The operational framework used as the basis for argument in this thesis is one designed to focus on foundational issues at the strategic and systemic level. There are few

steps that must be accomplished strategically and operationally to position tactical level elements for the actual operation to remove specified targets. These steps are inherent for the tactical level element to have the potential to be successful. The first step is identifying the target; specifically who or what is the decisive element that will have the most impact on the terrorist organization once removed. The second logical step is defining the target's location. This step happens first at the regional level, then the location is further refined to the country, then the province, then the city until there is actually a workable solution for the tactical level element designated to resolve the issue. The next logical step is gaining physical access to the target's area of operation for the tactical element selected for conducting that operation. The last logical step necessary for successful potential operations is the authority for the designated tactical element to conduct the necessary actions on a timeline dictated by opportunity, not the institutional approval process. This is especially important when tracking and targeting a specific individual that is not tied to geographic location but is fleeting by nature.

The steps identified above are the same regardless of the element, agency, or branch chosen to conduct the operation or the method that element will use to conduct the operation. The core of these steps forms the strategic framework necessary for operations. They can be further refined as access to intelligence (defines the target as well as the expected location), access to the operating area, and authority to conduct operations. The challenge addressed here is not in accomplishing these items, but who accomplishes them and who directs them. Under the current systemic structure, these specific tasks are divided among different agencies of the executive branch and are specified in legislation for routine operations. For example, the Central Intelligence Agency (CIA) has the

legislated mandate to prioritize, collect, manage, and analyze intelligence outside the US. This makes the Director, Central Intelligence (DCI) the clearing house for all intelligence to the executive branch as well as the legislature, as well as the determinate as to what is and what is not intelligence (*USC Title 50*, sec. 403-3). The Department of State (DOS) has the responsibility to represent the US in foreign countries through the Ambassador, the President's senior representative in that foreign country. This translates into the DOS having control over the physical terrain associated with targets unless that area has been formally designated as a war zone. It also puts the Ambassador into the approval process for any element to conduct operations until the President specifically changes the relationship through a directive or order. Both of the above examples are problematic based upon competing priorities and intent from the individual executive agencies. This, by historical precedent, leads to a long and convoluted approval process with several agencies competing for priority, and multiple elements having a vote (or veto) in potential operations conducted by any one element. This strategic operating environment is further degraded if the intent is to remove the target and render him to the US to face legal action as the law enforcement community then has a role, and can add to the complexity of the approval process, as well as changing the potential operational parameters for whichever element is selected to conduct those operations.

The strategic framework for potential operations will be examined based on two primary factors. The first is legislation. The foundation of this argument will be the United States Constitution. This core document assigns primary responsibilities and authorities for the executive branch as well as the legislative and judicial branches, as it pertains to national security. The main effort of this section, however, will be to examine

USC as it pertains to three primary areas: intelligence; access to operational areas; and authority for operational execution. The emphasis will be on *Title 10, Armed Forces; Title 22 Foreign Relations and Intercourse; and Title 50, War and National Defense*. Other areas of *USC* will also be examined, specifically areas regarding law enforcement and intelligence, as they are applicable to the argument. Chapter 3 will focus exclusively on this legislation and will define the strategic, national, legal framework currently established.

The second area of examination will be national policy as determined by the executive administration. This can take the form of presidential directives, executive orders, national security directives, public proclamations and others. These tools of forming national policy are powerful methods at the President's disposal to shape the strategic framework of his executive agencies as they pursue their assigned tasks. Often these directives carry the weight of law and can conflict with current legislation. Pundits and legislators alike have questioned the constitutionality of these policies, but rarely has the judicial branch supported the dissenting opinion (Dean 2001). However, where available, these dissenting opinions will be discussed to identify potential friction points. Current policy, the power of the president to formulate policy, and the issues regarding constitutionality of those policy directives will constitute chapter 4.

Chapter 5 will summarize the impact of applicable legislation and policy, as well as discuss potential ramifications of policy decisions available to the president. Specifically, the role of the NSC and the power of the president to shape the strategic framework will be discussed and will include recommendations to articulate how the

DOD can be given the strategic flexibility necessary to accomplish their assigned mission.

How is this Relevant?

The DOD has been tasked to execute a global war on terror. The DOD perspective, however, is that the operational and strategic environment in which they must operate is not conducive to these operations but is prohibitive in nature. The environment is defined by domestic legislation and policy, is framed by international law and opinion (world and domestic), and has been interpreted to support whichever side (or element) is making the argument. The intent of this examination is to clarify the true framework from those things that are but implied, inferred, or simply desired and constitutes the true challenge. Once those things that are binding have been identified, the ability of the DOD to conduct unilateral operations is clarified and the subsequent relationships with other executive agencies can be formalized from a position based on structure instead of personality and historical precedence.

Another key product of this examination is the key roles and responsibilities of specific interagency players in regard to coordination and authority. The most obvious of these players is the NSC and the roles and responsibilities as they are defined in *USC* and subsequent presidential policy. The NSC is routinely tasked through *USC* to be the central clearinghouse for issues regarding policy and conflicts among the interagency and should be expected to be the “honest broker” that clarifies and establishes clear lanes for operational responsibility. Subsequently, the roles of the intelligence and law enforcement communities as it pertains to military operations should also be addressed to

ensure there is minimal overlap but appropriate supporting efforts between all the elements of national power.

CHAPTER 2

LITERATURE REVIEW

The literature for this thesis can be divided into two distinct categories; first is that which is legislative in nature and second is policy as dictated by the executive branch. Included in this will be that which could be categorized as analysis or opinion of said legislation and policy and will be used to offer dissenting views of literal definition, as well as the discussion of the constitutionality of presidential policy in the form of directives, proclamations, and others.

The legislation is written so there is little room for maneuver inside the bounds defined; however, there are multiple exceptions and alternate procedures written within the legislation to provide flexibility to the executive branch and to remain as close as possible to the framers' intent in the Constitution. What this in effect does is provide the opportunity for creative interpretation in both the letter of the law, as well as the intent of the law from the executive agencies involved.

The first category, legislation, is the primary focus of this examination. These works include the US Constitution as the foundation for determining power distribution and identifies the responsibility of the executive for dealing with foreign countries and protecting the national security. This document delineates the primary roles and responsibilities of the three major branches of government, as well as their relationships to one another. It sets the stage for the ensuing discussion on current legislation, as well as the potential of the president to establish policy through declaration and proclamation.

The primary area of investigation, however, will be with *USC*. The *USC* is the cumulative results of legislative acts passed into law, and defines the strategic operating limits to all governmental elements, as well as American citizens as a whole. The *USC* is broken down by functional areas to make cataloguing and reference easier, but that also constitutes one of the primary weaknesses of the document as it is difficult to appropriately cross reference all applicable pieces to ensure continuity and consistency. Several elements of *USC* are discussed in this thesis. The major titles are described below.

The most relevant portion of *USC* for this argument is *Title 50, War and National Defense*. *Title 50* seeks to delineate the roles and responsibilities of elements of the federal government as they pertain to matters of national security. The majority of the Title focuses on executive agencies (including the NSC) and defines the roles, responsibilities, and functions of each in the context of national security. Specifically, this title legislates the intelligence community and the NSC, as well as providing additional guidance and congressional intent for the president's usage of the military in potential contingency operations. It articulates the relevance of the US armed forces in the current conflict, and establishes the strategic framework in which its roles and missions are executed, as well as defining the basic process and legislated intent for interagency coordination.

The second Title of *USC* that will receive detailed attention is *Title 10, Armed Forces*. This Title defines the structural parameters of the DOD and articulates the basic responsibilities of each branch within. It includes the role of the Secretary of Defense (SECDEF), the role of the individual services, the roles and responsibilities of the

combatant commands, and the basic missions and intent of the active, reserve, and guard components of each element of the force. *Title 10* articulates the mandated intelligence elements within the DOD to include their budget process, their command architecture, and their relationship with and responsibilities to the DCI.

The last Title that will receive detailed attention is *USC Title 22, Foreign Relations and Intercourse*. *Title 22* is the primary legislative element that discusses the role of the DOS and the responsibilities of governmental members in foreign countries. It delineates the responsibilities of the chief of mission (COM), usually the Ambassador, and the expectations of all governmental personnel operating in that environment. All executive branch employees fall under the direction, coordination, and supervision of the COM while they are in that COM's country. The one exception is for "employees under the command of a United States area military commander" (*USC Title 22, sec. 3927*). The wording here is specific as those military members not under the direct command of an area military commander do fall under the jurisdiction of the COM (*USC Title 22, sec. 4341*). This portion of *USC* also articulates the roles of the president and DOD in the development and application of foreign policy and articulates the overall intent and responsibility of the DOS in regard to international affairs.

Other relevant Titles that will be examined include *Title 12, Banks and Banking* and *Title 15, Commerce and Trade*. Each of these Titles applies to the financial and economic system. One of the primary tools used by the executive branch in its conduct of the war on terror has been to seize assets and use financial data derived from those assets to further investigations against terrorist organizations. The sharing of that data, however, is contentious as it could potentially impede on the rights of American citizens, as well as

negatively impact on potential law enforcement efforts. As such, certain legal requirements have been placed upon the distribution of relevant data outside of the financial system.

Title 18, Crimes and Criminal Procedure, governs the Federal Bureau of Investigation (FBI) and the Department of Justice. It specifies jurisdiction and functional responsibilities as well as the relationship and requirements for assistance for using the DOD in law enforcement efforts. In all cases where military elements are desired, the Attorney General (or appropriate designee) must request assistance from the DOD formally; the DOD is able to assist in those contingencies (specifically related to weapons of mass destruction) where the crisis is immediate and the threat exceeds the ability of the civil authorities (*USC Title 18*, secs. 2332e, 229E, and 175a). Another caveat that is routinely expressed in *Title 10* and is reinforced here is that military assistance cannot interfere with military readiness (*USC Title 10*, sec. 382).

Title 21, Food and Drugs, specifies the roles and responsibilities of the Drug Enforcement Agency (DEA) and the associated responsibilities of those entities that interact with the DEA. The only significant input from this Title is in the area of intelligence and its' sharing. The DEA is included in the ensuing discussions of the law enforcement community.

Title 49, Transportation, encompasses all the areas of the Department of Transportation. Specifically it covers the Federal Aviation Administration (FAA), the Federal highway and rail systems, as well as the National Transportation Safety Board. Almost exclusively, these elements are users of the intelligence community. However, with the increase of awareness and vigilance due to increased terrorist threats and

credibility, these organizations now have the potential for receiving or collecting intelligence or items of intelligence value. There are legislative blocks in place through this Title, however, to limit the ready dissemination of this data outside the immediate Department.

The second primary area of literature included in this examination is policy as determined by the president through orders, directives, and proclamations. Presidential proclamations and executive orders have been a primary method of establishing policy since the administration of President George Washington (Relyea 2003). Since then, the names and methods for determining, approving, releasing, and monitoring those Presidential missives have changed but the nature has not. These are often overlooked tools of policy-making exercised by the executive branch and can greatly shape the systemic environment as well as the working relationships between executive agencies and other branches; they cannot, however, shape the international operating environment. Several examples of these will be discussed in chapter 4. The most relevant example is PDD 39. This PDD articulates the roles and responsibilities of the individual elements of the executive branch as it pertains to terrorism. Released by President Clinton, this document demonstrates the functional area approach indicative of past interagency actions. Each individual element is tasked to be responsible for those things they should already be responsible for, and no mechanism is articulated for mediating disputes or jurisdictional overlap.

Another example discussed in chapter 4 is PDD 56. Although the document itself is classified, the administration (Clinton) released a “White Paper” with the key points to facilitate implementation by the effected elements of the executive branch. The PDD,

according to the released abstract, intended to establish procedures and policy for interagency coordination, but once again, fell short of specifying agencies' responsibilities and dictating relationships. The only new guidance that comes from the PDD is integrated training and the development of a combined plan. Arguably, each of these was already specified or implied tasks to the NSC through existing legislation.

Also included in the ensuing discussion is an article released by the Cato institute in 1999 titled "Executive Orders and National Emergencies: How Presidents Have Come to 'Run the Country' by Usurping Legislative Power" (Olson and Woll 1999). The authors seek to identify the power that presidents have taken from the legislature through the use of presidential policy and the hazards associated with this trend. Although it is written as critical of President Clinton specifically, the information contained within is specifically applicable to the existing argument as it shows how the president has the historic power to reshape and retask the executive branch as well as focus national will through written and oral policy statements.

Lastly, there is a great deal more of analytical dissertation available through open source research that seeks to determine the constitutionality and authority of legislation and presidential policy. Included in this is "The History of, and Challenges to, Presidential Lawmaking: Why the Bush Administration's Use of Executive Orders is Nothing Novel" written by John Dean (2001). Dean's article is an overview of the power of presidential policy and discusses the times it has been successfully challenged. A much more detailed description of the forms and functions of presidential policy can be found in "Presidential Directives: Background and Overview" by Harold C. Relyea (2003). Each of these provide an historic backdrop for presidential policymaking.

CHAPTER 3

LEGISLATIVE STRUCTURE AND FRAMEWORK

This chapter will develop and discuss the current legislative environment as determined by established and formal law. Specifically, it will discuss the strategic environment in regards to the three primary questions discussed above; does the DOD control, or have access to the requisite intelligence architecture and associated analysis to determine the correct target and its corresponding physical location; does the DOD have access to the area of operations that would be necessary to conduct the required operations to remove the designated target; and does the DOD have the requisite authority to conduct the operations necessary to remove the designated target. First is an introduction and short discussion on the role of the three constitutional branches of the government as they pertain to this problem set. This relationship and the powers conferred set the stage for existing legislation and the powers of the executive branch, and are important during analysis as potential options for clarifying and restructuring the strategic environment are examined and discussed. Second is a description of the specified tasks for applicable governmental elements per the *USC* as it relates to the primary questions above. The analysis of the specified tasks identified in section two follows each subsection and attempts to answer the primary questions based upon the specified legislation. The final intent is to articulate the formal framework established by law, versus that established by custom, practice, and personality.

Introduction

The strategic operating framework for the DOD is defined through national law, as well as expectations and guidance articulated by the president. This chapter focuses on

the specific guidance, as documented in current legislation and will attempt to articulate that which is specified in *USC*, as well as that which is contradictory as it regards to the DOD's role in the war on terror. The role of the President, as well as his current guidance and potential authority, will be detailed in the next chapter.

The most significant challenge with identifying relevant legislation is derived from the manner *USC* is structured. *USC* is crafted by functional area and responsibility, making it difficult to ascertain all the applicable sections for each element as governmental functions are interdependent and cannot successfully be viewed in isolation. For example, the responsibility for intelligence collection and analysis is placed upon the DCI by *USC Title 50* (sec. 403-3). The majority of the intelligence community, however, is in the DOD and under the administrative guidance and control of the SECDEF. Additionally, elements of the federal law enforcement community also collect intelligence with their organic assets based on potential or current criminal activity, as well as perceived threats to domestic security. The DCI has a significant degree of control over all elements of the intelligence community per legislation, but he has direct ownership of only a small portion. This is exacerbated when the other elements have conflicting priorities with the DCI in the manner and timing of the usage of these assets. The DCI has no control over the law enforcement assets, and they are not required by legislation to share information they obtain if they determine it is not in their interest (see below). The DCI does have direct control over the DOD assets except in cases that are in support of a tactical mission given to the DOD or the president identifies the DOD as the supported element for a given task. The combination of these two conditions drives an interagency relationship that heavily relies upon cooperation and consensus between the

principals, as well as the structures of each element made up of hundreds of thousands of individuals. What this equates to is an intelligence system that is structurally dysfunctional due to legislation forcing a heavy reliance upon personalities and personal relationships to be effective. This kind of legislation leads to confusion at the tactical level and friction at the strategic and operational level.

The root cause of the above legislative conundrum is the basic structure of *USC* as it focuses legislation on one functional area at a time. Although this makes it easier for each element to see its specific role, it makes it more difficult to place that role in a strategic context that synchronizes requirements and deconflicts effort. The purpose of the ensuing discussion is to define those requirements per functional area as they pertain to the war on terror (as specified throughout *USC*), and to identify the friction points per legislation. To attempt this however, one must first examine the foundational document for legislation, the Constitution.

The Constitution of the US provides for a series of checks and balances in the US governmental structure. This was accomplished through the creation of three distinct branches of government, the executive branch (President and his staff), the legislative branch (House and Senate), and the judicial branch (Federal Courts). Each branch has its own set of powers designed to support and counter the other branches; this ensures it requires the cooperation and support of all three elements to advance or change significantly. In the context of DOD unilateral man hunting, each branch is responsible for a different roll. The judicial branch (briefly discussed in this and the subsequent chapter) is responsible for determining the constitutionality of existing legislation and for establishing historical precedent regarding new legislation and guidance. This is done

based upon their interpretation of existing legislation, as well as what they perceive to be the intent of the initial framers of the Constitution. Specifically, per the Constitution of the United States of America, Article III, Section 2, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.” In practice, this has made the judicial branch the arbiter between the executive and legislative branches.

The executive branch also receives its power from the Constitution. According to Article II, Section 2, “The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . . He shall have power, by and with the consent of the Senate, to make treaties . . .” The President’s oath upon assumption of the office is “. . . preserve, protect and defend the Constitution of the United States.” As the commander in chief, he is ultimately responsible for the security of the Constitution, and through that the US people and territory. This is the foundation from which he operates in the war on terror and provides the potential for significant, discretionary power. This is balanced however by the legislative branch through their power of the budget and other legislation.

The legislative branch is defined and structured through the Constitution in Article I. Section 8 grants the Congress the authority “To declare war . . . To raise and support armies . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States . . .” and per Section 9, “No money shall be drawn from the treasury, but in consequence of appropriations made by law. . . .” This last defines where the legislature receives the majority of its practical power--the power of

the budget. Section 8, however, grants the legislative branch the authority to shape the environment in which all US elements operate. Specifically, they have the authority and responsibility to legislate those practices and responsibilities necessary to execute the intent of the framers of the Constitution.

United States Code--Specified Tasks

The foundation for all actions accomplished by governmental departments and agencies is the legislation that creates, resources, and to a large extent, guides them. The structure derived from that legislation defines the roles of each element of the US Government in regards to exterior issues and threats, as well as that element's relationships with other elements of the national government. For the military, the primary legislation is encompassed in two sections; *USC, Title 10, Armed Forces*, and *USC, Title 50, War and National Defense*. These documents define the roles and responsibilities of the individual components of the armed forces, as well as their specified limitations and relationships with the interagency members and process. The specified mission--unilateral man hunting--broadens the portions of *USC* with direct bearing on the DOD.

There are other sections of *USC*, however, that establish boundaries and requirements for the armed forces. *Title 22, Foreign Relations and Intercourse*, has specific relevance in this mission set as it pertains to all official activities between the US and other nations. Clarifying the roles of the DOS and establishing required relationships between the DOS and DOD, *Title 22* structures the operational environment for governmental elements operating outside the US. Additionally, *Title 18, Crimes and Criminal Procedure*, and *Title 28, Judiciary and Judicial Procedure*, further complicate

the role of the DOD as the requirement to prosecute captured terrorists levies additional responsibilities and restrictions on DOD actions, as well as increasing the required coordination and interaction among and with other governmental agencies.

The ensuing discussion will focus on the three primary areas discussed above. First discussed will be the legislative parameters identified throughout *USC* regarding intelligence. Specifically, who has control over intelligence focus and assets and under what conditions does the DOD have the access to intelligence necessary to conduct the unilateral mission of man hunting. The second question that will be examined regards access to potential areas of operations. Specifically, who currently has responsibility for potential operating areas outside the continental US and under what condition can the DOD gain access to those areas necessary. The last question reviewed concerns the authority to conduct operations. Does the DOD have the authority to conduct operations to remove specified targets, or under what conditions does the DOD have the requisite authority. The first question that must be answered, however, is whether the DOD controls or has direct access to the intelligence architecture and associated products to allow it to identify key targets and their associated locations. Several portions of *USC* directly influence the intelligence community.

Access to Intelligence

Title 10, Armed Forces

Title 10 defines the requirement for the DOD to establish and resource several internal intelligence agencies. Included in this number are the Defense Intelligence Agency, the National Security Agency, the National Reconnaissance Office, and the National Imagery and Mapping Agency. These agencies have specific responsibilities

inside DOD and are designed to provide the warfighter with the resources necessary to conduct tactical level operations. The *National Security Act of 1947*, realizing there had become a significant issue with overlapping and competing capabilities inside and outside the DOD, established the DCI to attempt to alleviate conflicts and duplication between DOD and other intelligence services, as well as providing a single entity at the national level to synergize the disparate efforts into a single focus. This Act was codified in *Title 50 of USC* (see section below) but some of the elements were incorporated in *Title 10* by way of forced coordination and guidance. This equates to a great deal of capability residing in the DOD but limited ability to unilaterally use that capability without specific direction by the president.

Specific instances where the CIA is granted authority inside the defense architecture are evidenced throughout *Title 10*. For example, section 444 states “In furtherance of the national intelligence effort, the DCI may provide administrative and contract services to the National Imagery and Mapping Agency as if that agency were an organizational element of the Central Intelligence Agency.” Other cases, such as where National Imagery And Mapping Agency shares an installation with the CIA or where security is provided by the DCI, that facility is considered property of the CIA, regardless of the location and function of the facility (*USC Title 10*, sec. 444(b)(2)). Prior to the SECDEF recommending a Director for the Defense Intelligence Agency, National Security Agency, National Imagery And Mapping Agency, or National Reconnaissance Office; he must seek the concurrence of the DCI for the nomination. If the DCI does not concur, then the SECDEF must state the DCI does not concur in his recommendation to the president (*USC Title 10* sec. 201(a) and 201(b)). This requirement is reiterated in *Title*

50, sec. 403-6. Additionally, the DCI evaluates each of these directors annually and provides that to the SECDEF for consideration (sec. 201(c)(1)).

Tasking authority is where the DCI demonstrates the majority of his influence over the defense intelligence architecture according to *Title 10*. Specifically, unless the president directs differently, the DCI is the approval authority for collection requirements, prioritizing those requirements, and is the arbiter for priority conflicts. This can be adjusted by the SECDEF if the DCI agrees, but the decision belongs to the DCI (*USC Title 10*, sec. 441(C)). This procedure is logical for times where the defense intelligence architecture is underutilized such as peace or when the DCI wants to develop a certain area or issue to resolve a national security concern. It presents some significant issues however, when the DOD has competing requirements during the same periods. The SECDEF even has to consult with the DCI to exercise these agencies in their wartime missions (*USC Title 10*, sec. 193(d)(2)).

Title 10 also ties the DOD intelligence architecture to other governmental agencies. The best example is where the DOD intelligence community is required to share information with the law enforcement community “. . . to the extent consistent with national security” if that information is relevant to them (*USC Title 10*, sec. 371(C)).

*Title 12, Banks and Banking and
Title 15, Commerce and Trade*

The requirement to share any intelligence that could impact the financial institutions of the US with the Attorney General or the Secretary of the Treasury is established in *Title 12*, sec. 1831m-1. This section specifies the DCI, but states it also applies to any agency head that determines he is in control of relevant information.

This information sharing, however, does not flow each direction. Only the FBI is authorized access to data held by a financial institution and then only if it is accompanied by a request signed by the Director. The information is restricted from dissemination further unless it is specifically within guidelines established by the Attorney General (*USC Title 12*, sec. 3414 (a)(5)). This is less stringent in *Title 15* as it authorizes the release of data from a consumer report agency to a government agency when the data is for an investigation and is certified in writing from the head of the agency (*USC Title 15*, sec. 1618v).

Title 18, Crimes and Criminal Procedure

The sharing of data from the law enforcement community to other elements of the federal government has always been problematic. With the new emphasis on information sharing to prevent future terrorist attacks on the American homeland, new strides have been made to increase the flows of intelligence each direction. Legislation, however, still makes it a matter of personalities as the parameters for sharing information are determined by the Attorney General (*USC Title 18*, sec. 2709(d)). First, the data must be categorized as foreign intelligence collection, or from foreign counterintelligence investigations, and then it has to be determined relevant for dissemination (*USC Title 18*, sec. 2709(e)). The Attorney General then determines what criteria are used for further dissemination. This data is specifically intended to protect citizens of the US but is applied to any data received by federal law enforcement agencies in the course of an investigation.

Title 21, Food and Drugs

This Title applies additional responsibility to the intelligence architecture through the DCI. In section 1704, the DCI is obligated to provide as much support as possible to the Director of the DEA as well as managing the regulations necessary to protect the intelligence and sources associated with the counterdrug effort. This absorbs intelligence collection assets, as well as analysis (the more critical of the two) while starting to restrict access to the product. It becomes even murkier when the data derived is part of an ongoing investigation conducted by law enforcement, which puts the data release back under *Title 18* and the Attorney General.

Title 22, Foreign Relations and Intercourse

All executive branch agencies with personnel in a foreign country are required to keep the respective COM fully informed of all activities, to include military and intelligence operations or activities. The COM is the senior representative of the US government in a given country and works directly for the president even though he falls under the DOS and is responsible for the policies directed by the Secretary of State (SECSTATE). This becomes a significant factor as the COM may have conflicting priorities and responsibilities as it regards intelligence and military operations (*USC Title 22, sec. 3927*). Each COM is given broad and specific guidance to the desired course of events and relationship between the US and the receiving state. This creates potential conflict when a potential military operation could achieve short-term goals but jeopardize the long-term relationship with, or even the stability of the host government. The value of the target, as well as the potential second and third order effects, becomes very important in this example.

Title 49, Transportation

Section 44911 reiterates the responsibility of the intelligence community to keep the Secretary of Transportation and the administrator of the FAA informed of all intelligence that may pertain to transportation. This does not universally apply to the reciprocal. Section 44905 specifies that the administrator of the FAA should minimize access to threat information unless it would increase the risk to aviation security. This is another example of the structural blocks placed on the intelligence community. If the DCI receives intelligence that there is a threat against an airport, he is obligated by law to immediately relay the information. If the FAA receives a warning of a potential threat against the same airport, it is not structurally obligated to share that information outside the Department.

Title 50, War and National Defense

The DCI, appointed by the President, is the head of the intelligence community, as well as the head of the CIA (*USC Title 50, sec. 403*). The distinction is important when one realizes the scope of the intelligence community and observes that the majority of intelligence agencies are actually DOD elements. Specifically included in the legislature's definition of the intelligence community but not of the DOD are the office of the DCI; the CIA; the intelligence elements of the FBI; the Departments of Treasury, Energy, and the Coast Guard; and the Bureau of Intelligence; and Research of the DOS. Elements of DOD that are included in the scope of the DCI are the National Security Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Reconnaissance Office, the intelligence elements of the services, and other offices within the DOD that collect national intelligence through reconnaissance (*USC*

Title 50, sec. 401a). All of these elements are under the control of the DCI for the purpose of implementing the National Foreign Intelligence Program (NFIP) so as to provide national decision makers with the intelligence they need to resolve national security questions.

The NFIP is the term used to identify everything conducted by the intelligence community to satisfy intelligence requirements that pertain to more than one department or agency of the government. It does not include intelligence efforts conducted by DOD assets “solely for the planning and conduct of tactical military operations” (*USC Title 50*, sec. 401a).

The Office of the DCI holds several key responsibilities in the NFIP. The primary duties include “ensuring the efficient and effective collection of national intelligence” and “conducting oversight of the analysis and production of intelligence by elements of the intelligence community” (*USC Title 50*, sec. 403(d)(2)). Included in this is the ability to prioritize assets and determine level of effort for collection and analysis. All of these activities are accomplished at the direction of the president and the NSC and are further refined in section 403-3(c). Here, the DCI is specifically tasked with the responsibility to:

Establish the requirements and priorities to govern the collection of national intelligence by elements of the intelligence community . . . approve collection requirements, determine collection priorities, and resolve collection priorities levied on national collection assets . . . eliminate waste and unnecessary duplication within the intelligence community . . . protect intelligence sources and methods from unauthorized disclosure; and . . . perform such other functions as the President or the National Security Council may direct.

The DCI is responsible for disseminating the final intelligence to requisite users and customers. Specific requirements are to provide national intelligence to the president, the heads of executive agencies and departments, the Chairman of the Joint Chiefs of

Staff and senior military commanders, and to appropriate members of the legislature (*USC Title 50*, sec. 403-3). Further requirements defined in this section are for the intelligence to be timely, but the legislation falls short of defining the term. The challenge for the DCI is how to distribute timely intelligence while still applying the appropriate analysis to ensure the veracity of the intelligence, and then subsequently protect the source and method used to collect the intelligence. These constraints put the intelligence community into a difficult position as the users expect perfect intelligence immediately, while the intelligence community attempts to provide accurate intelligence as they can, with the DCI responsible for determining what each of those thresholds are for dissemination. This has led to the perception at the user, or tactical level that the need for intelligence to be verified and subsequently protected creates a situation where intelligence of tactical value is not received in a timely fashion, or is classified at such a level to make it unavailable to those conducting tactical planning or operations.

The DCI is granted several sweeping powers and authorities in section 403-3, some of which are specified above in his role as the head of the intelligence community. They are extended in his role as the head of the CIA where he is tasked to collect intelligence through human sources (HUMINT) and provide overall direction of all HUMINT directed at national intelligence objectives, ensure the effectiveness of HUMINT, and manage the risk associated with HUMINT operations. In this role, he is also tasked to correlate, evaluate, and subsequently disseminate national security intelligence, as well as to perform such functions as he determines can be accomplished more efficiently centrally versus in the individual elements of the intelligence

community. All of these responsibilities and authorities discussed here are supported through his legislated position in the budget process.

One of the largest powers resident in the DCI is the power of the budget. He is responsible for developing and presenting the budget for all the NFIP. This includes portions of the appropriations used by DOD intelligence elements in the conduct of their specific functions and is further enhanced as he participates in the development of the SECDEF's annual budget for defense specific intelligence programs and requirements (*USC Title 50*, sec. 403-3). This power is amplified in section 403-4 where, as the head of the CIA, the DCI is tasked to provide guidance for individual budget development and must approve the budgets prior to their inclusion into the NFIP. Once appropriated, the DCI is the approval authority to reprogram any funds under the NFIP, and the SECDEF must coordinate with the DCI prior to reprogramming funds specific to the Joint Military Intelligence Program. Although the SECDEF has the standing responsibility for resourcing the defense intelligence elements, this legislated arrangement allows the DCI to significantly shape the structure and focus of DOD intelligence assets.

There is some flexibility accorded the SECDEF in areas relating to the collection of intelligence specifically focused on tactical level planning and operations. Even this is constrained, however, as section 403-5 discusses the need for the SECDEF to ensure tactical intelligence activities are not just compatible, but also complement the NFIP. The SECDEF is also directed in this section, in consultation with the DCI, to ensure he funds the DOD intelligence elements suitably to allow them to meet the DCI's intelligence requirements. Interestingly, the legislation directs four priorities for the military intelligence architecture, the first of which is to meet the requirements of the DCI. The

other requirements, in order, are to meet the requirements of the SECDEF or the Chairman of the Joint Chiefs, meet the requirements of the unified and specified combatant commands of joint operations, and then meet the requirements for tactical commanders, planners, and staffs (support and institutional). These specifics, coupled with the constraints placed upon the SECDEF in *Title 10* (discussed above), show the focus of the entire intelligence community is the DCI.

The sum of the legislation in *Title 50* relating to intelligence and its associated architecture defines the DCI as the focal point for all intelligence matters. Not only is he legislated the responsibility, he is granted the requisite authorities to collect, analyze, distribute, and control that intelligence. This includes significant control over military assets, as well as maintaining responsibility for intelligence collected and made available from other elements of the federal government such as law enforcement, Department of the Treasury, the FAA, and others.

Title 50 also supports previous legislation constraining the sharing of intelligence by law enforcement personnel. According to section 403-5b, even information of acknowledged foreign intelligence value does not have to be shared if it would impair ongoing investigations or other interests of significance to the law enforcement community. The decision rests with the Attorney General even though the criteria are supposed to be arrived at jointly between him and the DCI.

Access to Intelligence--Summary

The DOD has full spectrum capability legislated under its structure. It also has great flexibility in the conduct of tactical collection, as well as product development and dissemination in this domain. The challenge to the DOD is when the intelligence

activities reside outside that ambiguous framework determined to be tactical. At that point, the DCI has full authority to determine collection tasks and priorities, as well as responsibility for analysis and product development. In this domain, the DOD must request and coordinate for intelligence support, including assets that structurally belong to the DOD. Additionally, any intelligence that is obtained by other agencies and departments funnel into the DCI's structure based upon their individual determination. For the DOD to have access, the DCI must first receive the intelligence, determine it is of value, and then disseminate to the DOD.

This structure puts the SECDEF in a unique position when not executing a tactical mission as directed by the president. In the tactical realm, the SECDEF is typically the supported element (although not exclusively), and the DCI and his subordinate structure is directed to support the SECDEF's mission. This does not relieve the DCI of his other specified and implied missions regarding the intelligence architecture and national security however and puts the DCI in the position of having to prioritize intelligence missions below the tactical mission. In other conditions where the mission is not specified by the President and or does not reside in the tactical realm, the DCI maintains control of the intelligence community's assets and products. In this case, the DCI continues to prioritize his levels of effort based on his perspective and task load versus the DOD perspective. Accordingly, the DOD may not get the level of support it desires or have access to products that are being developed by the DCI to support other requirements, even when the assets used are DOD assets. There are two key determinants as to the level of support and access the DOD receives based upon this.

The first determinant is whether the activity is formally tasked by the president and the interagency relationships are defined in that tasking. This resolves all issues as each participant is an executive branch element and legislation supports this role of the president. The second determinant is whether the activity undertaken by the DOD is considered tactical. If it is a tactical effort (planning, preparation, or operation) then the DOD has the ability to control DOD intelligence assets and can make requests directly upon the remainder of the intelligence community through the DCI. If it is not a tactical effort, the DOD does not have direct authority, or priority, over the intelligence architecture, including DOD elements. As such, conducting implied missions above the tactical level become problematic if intelligence is a critical piece.

Recently, it has been asked by military pundits as to why the DOD simply does not build its own architecture to resolve its own intelligence shortfalls. As shown above, that architecture already exists at the national level, in large part as DOD assets. The control, however, would still remain with the DCI per existing legislation. Additionally, the DCI would be forced to resist that growth by the DOD per the same legislation, as he is tasked to eliminate waste and duplication inside the intelligence community. The only relief from these constraints is for intelligence actions and products intended specifically for planning and conducting tactical military operations. It bears further consideration and clarification on the scope of tactical as it appears to be undefined in this legislation. Even without the definition, there are still legislated constraints (as indicated above) placed upon the DOD in regards to this tactical intelligence activity.

Access to Operating Areas

Title 10, Armed Forces

The Combatant Commander for each geographic region is responsible for military forces in that region, as well as the assigned missions for that command. This includes employing those forces assigned to his command, as he deems necessary, to carry out assigned missions (*USC Title 10*, sec. 164). Missions are assigned either from the president or from the SECDEF with presidential concurrence.

Title 22, Foreign Relations and Intercourse

The COM for a given country exerts great authority over those governmental assets within his jurisdiction. This does not, however, include “employees under the command of a United States area military commander” (*USC Title 22*, sec. 3927). Constraints currently enforced in practice (country and diplomatic clearance procedures) are not directly evidenced in this legislation but are instead a product of bilateral agreements between the DOS and the host nation. Currently, military regulation requires adherence to those agreements except when operating under an operational order

Access to Operating Areas--Summary

The Combatant Commander holds the key to access for military personnel once he has received an operational order (Department of Defense 2004). Legislation does not restrict military members assigned to a regional military commander from traveling or conducting activities in that country. There are practical restrictions placed on DOD personnel through other means, such as the *Foreign Clearance Guide*, that establish requirements for approval of the country team prior to a military member traveling in a foreign country. These restrictions are not based upon legislation, however, and appear to

be the product of department and agency regulations and policy gleaned through bilateral agreements between the DOS and host nations. The requirement does exist through legislation to keep the COM fully informed of activities that are or will occur in his country, but it does not state that he has the ability to determine access for military members belonging to the geographic combatant commander, or to determine if military activity is conducted. Bypassing or ignoring the COM, however, could jeopardize the specific mission, as well as long-term national interests that may be as important (or more so) than the current operation.

Authority to Conduct Operations

Title 10, Armed Forces

Roles of the combatant commander and the unified commands are identified here and augmented in *Title 50*. Specifically, each combatant commander is responsible for the area assigned to his Command and for conducting operations assigned to his area of responsibility. Approval authority to conduct operations, however, is limited to those operations and areas already approved by the president, or the SECDEF with the concurrence of the president. Missions that can be implied from other guidance do not carry the authority to allow unilateral operations, per the legislation in *Title 10*.

Title 10 also places several restrictions on the involvement of military personnel in certain types of operations. Specifically, section 375 restricts the direct involvement of military personnel “. . . in a search, seizure, arrest, or other similar activity unless such activity by such member is otherwise authorized by law.” This significantly restricts military operations against indicted personnel if the specified intent is the capture of said personnel, or more specifically, if the DOD is not the lead element, and the mission is

capture with the intent to prosecute. More importantly, as law enforcement personnel are attempting to capture and render terrorists that have been indicted, military assistance is not readily available.

Title 18, Crimes and Criminal Procedure

Section 2332b defines the jurisdiction of the judicial system over acts of terrorism. This has direct bearing on the methods used to capture personnel who are indicted for criminal terrorism. It places the burden of evidence and procedure upon the military element used to conduct the operation unless the specified mission excludes that responsibility. It is important to understand the prohibition against the use of military personnel for deliberate law enforcement activities (see *Title 10* discussion above) and how these constraints become applicable. If the DOD conducts an operation against a specified target and that target surrenders, then the requirements for the DOD element must be specified prior to initiation of the operation so that procedurally, appropriate steps are taken to ensure the ability to prosecute the target is retained.

Title 22, Foreign Relations and Intercourse

Section 2382 identifies the COM as the pivot point for military training in a given foreign country. Here again, the COM is given responsibility as the lead element for all representatives of the US government. Additionally, the responsibility for determining where, when, and how much military assistance or education and training is offered and subsequently accomplished resides solely with the SECSTATE. Military members deployed to a country to provide advisory, training assistance, or liaison fall under the direct jurisdiction of the COM (*USC Title 22, sec. 2321i*) versus the area military commander discussed above.

Specifically, section 2305 identifies the SECSTATE as responsible for establishing the national security assistance strategy for the US and in so doing, determines which countries receive security assistance, what type, and what the primary and secondary objectives are of that assistance. This is formalized annually through a written report to Congress prior to receiving the requisite appropriations to execute the plan. Although it is intended to be coordinated with the DOD, the SECSTATE builds the plan and the COM of each respective country is responsible for executing the plan, regardless of the participants carrying out the plan. This creates the potential for interagency conflict as other potential operations may be at odds with the stated objectives in this plan and can meet resistance at the strategic level (institutional) as well as the tactical level (with the COM).

Section 2651a establishes a coordinator for counterterrorism that “shall be the overall supervision (including policy oversight of resources) of international counterterrorism activities.” There are no specified allowances or exceptions for military actions listed in regard to this position.

There are other tasks that provide significant potential for conflict between military commanders and personnel operating in foreign countries. For example, the SECSTATE is specifically tasked to develop policies and procedures intended to protect all government employees (excluding military members operating under a regional military commander). This creates potential conflict if the COM sees proposed military operations as increasing the risk to other American citizens in his jurisdiction (*USC Title 22, sec. 4802*).

All executive branch agencies with personnel in a foreign country are required to keep the respective COM fully informed of all activities, to include military and intelligence operations or activities (*USC Title 22, sec. 3927*). This does not automatically give the COM the ability to influence those activities, but provides him the opportunity to engage higher echelons if he does not feel it is in his best interest to allow the activity to continue.

Title 50, War and National Defense

The War Powers Resolution, incorporated into *Title 50*, seeks to greatly reduce the president's authority to put military forces into a situation where hostilities are or could be expected. Section 1547 is the interpretation resulting from the joint resolution derived in 1973. In this section, the president requires specific legislative authority to move military forces into this type of situation unless it is derived from a declaration of war or a national emergency derived from a direct attack on the US or its forces (*USC Title 50, sec. 1541 and sec. 1547*). Section 1542 even goes so far as to require consultation with congress prior to the introduction of any troops into potential conflict.¹

Authority to Conduct Operations--Summary

The authority to conduct operations is simple for the DOD. It requires an assigned mission from the president (or SECDEF with presidential concurrence) as discussed

¹ Author's note--The Constitutionality of the *War Powers Resolution* and other associated legislation to restrict the President's authority to conduct his role as commander in chief has never been tested in the Supreme Court. This has been true from both potential claimants as the Executive Branch has never addressed it; and when Presidents past have issued directives that directly conflict with the legislation, the Legislature has chosen to not fight it in the judicial system. This does not amount to a decision on Constitutionality, but on an astute awareness by all parties for the need to maintain a balance between the two branches. Formally addressing it through the Supreme Court would amount to a potential reduction in power for one of the two branches.

above in the section on *Title 10*. With that authority, the DOD is normally the supported element and has full access and authority to conduct its assigned mission. Exceptions to this are possible, but will be clearly delineated in the order assigning the mission.

Without that mission, the DOD is relegated to a supporting role and may or may not have the authority to conduct anything other than force protection operations for a given fixed base.

CHAPTER 4

PRESIDENTIAL LAWMAKING

An underestimated method of influencing the strategic operating environment for executive agencies and departments is through the president. The president has significant authority to make decisions and declare policy through the power of his office. Some of this authority comes directly from the Constitution while some is implied through legislation, and some has been assumed and accepted by previous presidents. Although these policy measures can take many forms, they have routinely been transmitted through two methods; the written policy directive (Presidential Declarations) and the oral policy directive (Presidential Proclamations). The official titles of these missives have changed routinely since President George Washington made the first set during his tenure, but the result is the same. Either can establish policy, and both can have the practical power of law. The purpose of this chapter is to examine the history, applicability, and authority of this form of presidential policy making and apply its current state, as well as its potential, to the unilateral DOD man-hunting mission. It includes a brief analysis of current policy under the constraints of the classification level. Most recent policy directives released by the executive branch are classified at the SECRET level or higher. They are usually accompanied, however, by an unclassified abstract published in the *Federal Register*, unless sensitivity or classification level prevents its open dissemination (*USC Title 50*, sec. 413b, sec. 426, and sec. 1641). This restricts current information, but will still allow examination of the potential influence of these missives as well as the most important aspect, the potential of presidential policy.

Following this will be a short discussion of occasions where presidential policy has been successfully challenged through legislation or the judicial system. First, however, one must understand the scope and various forms of presidential policy making as they have existed through US history, as well as how they exist currently.

The initiation of presidential policy through proclamation and declaration began with President George Washington as he formally declared Thursday, 26 November as a day of public thanksgiving for the people of the US (Relyea 2003, 1). Since then, presidents have used these forms of policy making to accomplish policy decisions that were either outside the normal legislative process, were issues for the commander in chief, or in order to expedite action when the legislative process was perceived as too slow.

These directives have been called many things over the various tenures of the presidents, such as administrative orders, executive orders, presidential decision directives, and presidential review directives. All of these accomplished the same intent of formalizing the president's desired policy intent. In the recent past, executive agencies and departments have joined the effort by formulating policy recommendations based on broader intent as provided by the president. If approved, these missives are signed by the president and carry the same weight as the other products previously discussed. Most of these have come from or through the NSC and are named based on the sitting administration. Some examples of these include NSC Policy Papers (1947 through President Eisenhower's term), National Security Action Memoranda (President Kennedy), National Security Study Memoranda and National Security Decision Memoranda (President Nixon), National Security Decision Directives (President

Reagan), and National Security Directives (President G. H. W. Bush). In addition to these, President Bush (the 43rd President) has two other primary tools for the written policy directive; the Homeland Security Presidential Directive which governs domestic security issues, and the military order to fulfill his role as the commander in chief.

The use of executive orders, a specific category of formal policy guidance from the chief executive, has waxed and waned since the founding of the presidency. The Cato Institute published an analysis of these actions in October of 1999 titled “Executive Orders and National Emergencies: How Presidents Have Come to “Run the Country” by Usurping Legislative Power” (Olson and Woll 1999). In this analysis, two lawyers examine the “abuse” of constitutional power by presidents and discuss the ramifications of the states, legislature, and judicial system not having engaged and checked the growing use of this authority. Although the article focuses on the actions of then President Clinton, several interesting points are raised about these forms of legislation through executive order. According to the article, there is no foundation in law, much less the constitution, for the majority of executive proclamations or orders. The few that are founded on constitutional authority or formal legislation (such as presidential pardons and military orders) carry the weight of law based on their foundational authority. Other methods of justification have also been used by presidents to accomplish these declarations. For example, President Truman used the United Nations Charter as justification for Executive Order 10422, and other presidents (including Presidents Reagan and Carter) used executive agreements (referred to as unratified treaties by the Cato article) to establish policy. None of these have been successfully challenged in court.

A table from the article, partially quoted below, identifies the numbers of times this authority was used from President Lincoln through President Clinton.

Table 1. Executive Order Usage

President	EOs Issued	President	EOs Issued
Abraham Lincoln	3	Calvin Coolidge	1,253
Andrew Johnson	5	Herbert Hoover	1,004
Ulysses Grant	15	Franklin Roosevelt	3,723
Rutherford Hayes	0	Harry Truman	905
James Garfield	0	Dwight Eisenhower	452
Chester Arthur	3	John Kennedy	214
Grover Cleveland	6	Lyndon Johnson	324
Benjamin Harrison	4	Richard Nixon	346
Grover Cleveland	71	Gerald Ford	169
William Mckinley	51	James Carter	320
Theodore Roosevelt	1,006	Ronald Reagan	381
William Taft	698	George Bush	166
Woodrow Wilson	1,791	William Clinton	304
Warren Harding	484		

Source: (Olson and Woll, 1999)

In total, there have been over 13,000 executive orders documented since the numbering system was incorporated in 1862; prior to this time, the orders were not formally annotated as such, but have since been incorporated into collections such as James D. Richardson's *A Compilation of the Messages and Papers of the Presidents* (1897).

Examining the table above, a significant trend can be noted during times of war. President Lincoln initiated the trend as the first President to use executive orders to fulfill his role as commander in chief (Dean 2001), but since then, the majority of presidents in

a war time environment have done the same (Wilson in World War I, Roosevelt in World War II, Truman in Korea) and even expanded that role. War has not, however, been the only reason for issuing this form of guidance.

Presidents have used executive orders to accomplish a wide variety of tasks. In addition to the war time tasks referenced above, presidents have used executive orders to do everything from establishing a new office in the executive branch (such as the establishment of the Office of Emergency Management in 1940 and President Bush establishing the Office of Homeland Security with Executive Order 13228), to reorganizing elements of the executive branch, to establishing committees, to study specific issues relevant to that president, to declaring things such as holidays and days of mourning. Of all these policy directives issued by sitting presidents, only two have ever been successfully challenged and overturned in the judicial process.

The judicial branch, as discussed earlier, has the responsibility to fulfill the framers' intent, and to counter the power of the legislative and executive branches in order to ensure an appropriate balance of power remains among them. As the power of presidential policy making has grown through the use of these proclamations, the courts have shown significant restraint in challenging this growth of executive authority. Throughout, only twice has an executive order or directive been successfully challenged in this manner. In each of these cases, the president attempted to exercise control over domestic business efforts. The first was when President Truman attempted to avert a strike in the steel industry by seizing several steel mills with the intent of the Secretary of Commerce operating them. He felt a strike at that time (Korean War) would jeopardize national security. The Supreme Court, however, disagreed and stated he had overstepped

his bounds, attempting to do something that was fully in the purview of the legislature. The second time presidential policy was successfully challenged in the courts was against President Clinton as he attempted to block the award of federal contracts to companies that were hiring workers past an ongoing strike. This event was stopped by a lower federal court on the grounds that it was an illegal directive from the President. He did not appeal it to a higher court, and therefore it stands as a legal precedent. The courts, however, are only one form of restraint on the executive branch; the primary restraint on the use of presidential policy making has come through the legislature.

Legislative review and action has far exceeded the courts in scope, and influence, regarding these same executive policy measures. According to Appendix 3 of “Executive Orders and National Emergencies: How Presidents Have Come to “Run the Country” by Usurping Legislative Power,” there have been numerous occasions where the legislature has addressed presidential executive orders and either formalized them, revoked them, or modified them through statute (Olson and Woll 1999). Specifically, 239 executive orders have been either modified or revoked by legislation. This number seems significant until one realizes this is from the more than 13,000 total executive orders issued to date (less than 2 percent of the total). What the study does not show is the purpose of modification or the relevance of the executive orders that have been revoked. From a cursory review of the *Federal Register*, issues of import to the Executive have not been successfully challenged and revoked, although some have been heavily modified as they were codified into law by the legislature. A perfect example of this is the Department of Homeland Security as it was approved by the legislature versus what was initially declared by the

president (*Homeland Security Act, 2002*). There is another side of presidential policy making, however, that must be addressed, the oral proclamation or declaration.

The second primary form of presidential policy decisions comes from the oral proclamation. This form is usually considered simply his intent, except in those cases where it directly applies to executive branch agencies or departments. In those cases, it is specifically considered as guidance. The challenge becomes capturing exact wording, as well as actual intent. This has become easier in the last several years as speeches and news conferences are now recorded and reproduced verbatim on the internet and on national and global news. This method of policy guidance is not as prevalent, or authoritative, outside the president's branch however, and is often used only to clarify or reiterate earlier declarations and orders. The combination of these methods is the primary method in which a president guides and establishes priorities of effort for his branch of government.

The ability of the president to manage his disparate agencies is often tied to the executive order. In the context of counterterrorism and antiterrorism actions, several presidential orders have been issued to define tasks and identify responsibilities of the disparate elements of the executive branch. One of the latest to be officially unclassified and released is PPD 39 from President Clinton. In this PDD, President Clinton established his policy on counterterrorism through clarifying his intent, and then specifying which element of the executive branch had the responsibility to carry out each task. In typical fashion, however, this executive order assigned multiple agencies as the lead element for different types of efforts. Although keeping the functional experts in charge of their areas, he failed to address the seams between functional areas. For

example, under the sub-area of “Reducing our Vulnerabilities,” he tasked his subordinates based on their functional area. The SECSTATE was tasked with ensuring the security of all US personnel and facilities abroad. Additionally, the Secretary of Transportation was tasked with ensuring the safety of all US passengers and aircraft, as well as maritime assets operating under the US flag. He did not however, address who had the lead for security of US maritime or aviation assets operating outside the US; as written, both have the responsibility. Also in this section, the DCI is identified as the lead for the intelligence community for all efforts to reduce vulnerabilities to international terrorism. This functional tasking continues throughout this PDD and is best portrayed under the area titled “Transportation-related terrorism.” In this section, the FAA is identified as having “exclusive responsibility in instances of air piracy” but only for the coordination of law enforcement efforts. The law enforcement community is tasked to develop procedures through the FBI to address those same instances; they must, however, be “in coordination with the Departments of State, Defense, and Transportation, to ensure the efficient resolution of terrorist hijackings” (Federation of American Scientists 1995, Subparagraph G). This has the effect of making the FAA responsible for coordinating unspecified FBI procedures, which must be agreed upon by all concerned at the time of execution, and will not be approved until it is time to accomplish.

The value received from this PDD is that the president has the authority to delegate responsibility and authority to those under him as he sees fit. The primary problem of this PDD is that it simply repeats those tasks that clearly fall inside the jurisdiction of the elements tasked. The issues of lead federal agency for broader counterterrorism, antiterrorism, and incident response were not definitively addressed.

Neither was there a method identified to manage interagency rivalries or conflicts in this scheme. It is interesting to note, however, that this PDD simply establishes the baseline for routine behavior. For example, in areas where the president has determined a different priority of effort, such as for the Department of Homeland Security or a designated war zone such as Afghanistan or Iraq, he has realigned the responsibilities evident in this PDD either through another executive order or other method (such as a military order establishing new supported and supporting relationships). This theme remains consistent throughout the declarations that have been released, as well as the abstracts of those still classified.

A significant attempt to institutionalize the interagency process was accomplished through PPD 56. Although the actual PDD is still classified, the Clinton administration released an unclassified summary of the PDD in 1997, identifying the intent and primary tasks to allow for easier implementation among the interagency. Specifically, the PDD directs the NSC to establish a process wherein the DOD conducts training, in methods of planning and coordination, for the interagency elements that would play a significant part in any complex contingency operation. Other key elements of the PDD include a proscribed planning process for political and military actions and requires after action reports to examine the shortfalls and problems each time the process is exercised and articulate lessons learned to be instituted prior to the next process. This PDD is a good first step toward alleviating the interagency bottleneck and establishing a workable process that could clarify responsibilities and tasks. Unfortunately, it does not specify a lead for any given effort and it does not address the institution structures as a whole. Instead, it recommends the NSC create another deputies commission that would

accomplish the specified tasks. The true value in this PDD is that once again the president has shown his ability to force integration and cooperation among the interagency partners and to reshape the institutional norms, as well as their tasks. Unfortunately, according to a report by A. B. Technologies, a study group commissioned by the Joint Chiefs of Staff to examine the interagency process and the implementation of PDD 56, the spirit and intent of the PDD have not been followed, nor has the NSC accepted responsibility and accomplished its task as the lead for coordinating the effort (Scarborough 1999).

Several other unclassified proclamations and declarations address this issue directly. Under President George W. Bush, the Department of Homeland Security was created through several executive orders. This policy implementation was then coordinated through the legislature and became law with the *Homeland Security Act of 2002*. Throughout the process, the president released executive orders clarifying the roles and responsibilities (as well as the structure, manpower, and authority) of the new agency; these executive orders were often released as Homeland Security Policy Directives of which eight had been released by the end of 2003. Although this agency's primary responsibility is for domestic protection and security, it has a direct impact on the DOD, and specifically this mission set, through two primary areas. The first is intelligence; homeland security is the number one priority as specified by the president through routine proclamation, and requires a great deal of intelligence support to be effective. The intelligence community is a limited asset that can only provide a certain amount of support at any given time, and now that support has a new customer in homeland security. This directly draws from the amount of intelligence assets and focus the DCI has available for other tasks, to include DOD missions, and exacerbates the

second issue that comes with the new Department, coordination. The Department of Homeland Security is now a peer of the DOD at the cabinet level, as well as having a direct interest in certain DOD actions such as usage of the National Guard, as well as intelligence assets and analytical capability. Throughout these directives, however, a clear statement as to the priority for support has not been made. The implication is that if homeland security fails, then everyone fails. This is not however, articulated, and the left and right limits of daily interaction are still being determined by those accomplishing the action; and, as in the other directives discussed, no single element has been identified as the agency responsible for the coordination, deconfliction, and prioritization of missions, support, and assets.

The examples listed above are relevant for two specific reasons. First, they show the current diffusion of effort at the interagency level and highlight some of the potential conflicts that can come from that diffusion. This replicates the environment currently defined by the legislature as discussed in chapter 3. Each element's area of responsibility is clearly defined, as well as the existing overlaps and inherent friction points. What is not addressed in the legislation, or in the available presidential missives, is the clear prioritization or hierarchy of responsibility for this mission, or the relative position of this mission among other national interests.

The second point to be pulled from the above discussion is the incredible latitude the president has to shape the operating environment for elements of his branch. Each of the policy declarations specify tasks that may or may not be supported in legislation. The issues for homeland security were later incorporated into legislation (primarily for the continued funding of the department) but the specified tasks and responsibilities for the

new department were left vague enough to allow flexibility for the president to continue to allocate tasks and responsibility among his elements. This is critical to the DOD in regard to the discussed mission, as it allows the president to clearly define the mission, identify clear interagency relationships, and to shape the strategic framework in which that mission is to be executed.

This shaping includes “clarifying” existing legislated restrictions and responsibilities. The president’s power through policy, as exhibited above, clearly articulates the potential for him to reshape the strategic operating environment regardless of whom among the executive branch he desires to accomplish the designated tasks. If done clearly and definitively, it can alleviate the requirement for any element to conduct operations unilaterally. Instead, it can establish the potential for interagency synergy in an environment shaped by the chief executive for the task specified.

CHAPTER 5

SUMMARY AND RECOMMENDATION

Although the strategic operating environment discussed in the preceding chapters demonstrates a complex situation with more barriers and friction points than clear avenues of success, there is ample space within the current system to ensure the potential for success of this mission. The challenge becomes in articulating that desire for unilateral action from the DOD, and the direction of other elements of the executive branch to provide the required support, as well as having the required support from the political will to accomplish the stated mission. All of this can be accomplished under the current system given the appropriate guidance from the president and the focused support of his subordinates.

The potential for success of the DOD mission discussed throughout this thesis relies upon three primary areas: (1) access to intelligence, (2) access to the areas of potential operation, and (3) the authority to conduct operations. The first, access to intelligence, is critical for several reasons, not the least of which is identifying the appropriate targets. Also in this area is the focus necessary for the intelligence community to provide the geographic location of the designated targets, as well as collecting and analyzing the data gleaned from operations against that target, to include the second and third order effects on the target's network resulting from offensive operations. Current legislation places this responsibility upon the DCI and the intelligence community, to include DOD assets that fall under his guidance and focus. These requirements, however, must be weighed beside the other issues of which the DCI

has primary responsibility, and receive the appropriate focus and priority to ensure the DOD receives timely and accurate data. There are three methods which can accomplish these requirements: cooperation, direction, and managed.

The legislation provides a great deal of flexibility to the DCI to determine his own priorities inside the broader intent provided by the president and the NSC. Under this framework, it would be possible for the DCI and the SECDEF to coordinate the appropriate focus of the intelligence community to meet DOD mission requirements. This requires a good working relationship between the two departments, as well as an inherent understanding of the competing priorities and the necessary sharing of assets to accomplish both mission sets. Although this has the best potential for maximizing the value of the intelligence community and creating the environment for rapid information dissemination and coordination, routinely accomplishing this level of cooperation at all levels is problematic based upon the existing legislative structure. The structure places significant hurdles upon the principals, as well as the subordinate structures, causing the success of the endeavor to rely almost exclusively upon the personalities and willingness of each participant, at every level, to support the cooperative arrangement. This has shown to be viable at the tactical level, but the competing priorities at the strategic level (not the least of which is the budget) make this method the least desirable as a long-term solution.

The second option, and the one that addresses the structure versus the personalities, is the directed option. Using this method, the DCI would be directed to support the military activity and would have his priorities determined for him. This has some associated risk as the focus may lead to an over-appropriation of resources toward

the DOD mission. This may lead to future intelligence shortfalls in other areas of interest for the nation as a whole. This potential intelligence gap, and the associated risks to the homeland and other national interests, identifies this option as also less than optimal.

The final method to resolve this issue is the managed option. In this situation, a clear priority of effort is established for the DCI through executive order, and the associated conflicts in assets and analysis are mediated by a third party. This third party would then be responsible for managing the strategic requirements placed upon the DCI by the other governmental agencies, as well as the DOD. Under the current governmental structure, as well as through existing legislation, that third party is logically the NSC. The NSC is specifically designed to provide the level of interaction necessary to ensure decisions can be made and issues resolved at this level. Both the SECDEF and SECSTATE are statutory members (as well as the president and vice president) and the National Security Advisor, the Chairman of the Joint Chiefs of Staff and the DCI are statutory advisors; these are the primary players in national security as a whole, and have the majority of the equities involved in any type of operation to meet national security interests. It would be logical (as well as the stated legislated intent in *USC Title 50*, sec. 402) that the NSC would be the designated arbiter or mediator at the interagency level.

The second area necessary for success of this mission is access to the areas of operation. Current legislation and presidential policy places the burden of actions outside the US upon the DOS. There are specific allowances, however, for the geographic combatant commander to operate in his designated area of responsibility to accomplish missions given him by the SECDEF. The challenge for actually accomplishing this, however, are the multiple agreements made at the diplomatic level for the coordination of

military travel and action, as well as the potential conflicts of priorities at the individual country level and between competing national interests. This too, can be resolved using one of the same three methods: coordination, direction, or management.

Coordination for this event is more difficult than for coordination of intelligence support because there are more personalities involved and significantly more potential for immediate and undesirable second and third order effects. The COM, usually an ambassador, has overall responsibility (normally) for everything that happens in his designated country. The obvious exception is when the president issues (or approves) a military order or presidential finding for action in that designated space. Regardless, however, the COM bears the considerable burden for coordination and deconfliction of activities inside that country to ensure the relationship with the US continues as is, or improves. Regional military commanders desiring to operate inside that space would need to coordinate actions with the COM, and measure potential action against second and third order effects on potential future relations with that country and others. Although possible, this coordination and cooperation requires like priorities between DOS and DOD, similar understanding of national interest and priorities, and is heavily reliant upon the personalities of the individuals at the country level. The absence of structural support to this method makes this option less than desirable.

The second method that can be used is the direction of the DOS and associated country team to support the DOD activities. This can be accomplished through executive order or through a military order. This would obligate the country team to coordinate and support military actions, as well as deal with host nation issues that arise from those actions. The most significant drawback to this method would be the potential sacrifice of

other national interests and priorities in that and surrounding countries due to the singular focus that would come from that order. These risks make this less than optimal for a sustained method of execution.

The last method, and the most desirable, is the managed option. In this situation, as above, priorities of effort can be established, lead agencies identified, and interagency relationships established through executive order. Conflicts between assets and actions, as well as the associated risks, can be discussed and mediated by a third party to ensure that the higher national intent and interests are being satisfied and that long-term national security, interests, and prestige are considered. This would allow the country team to identify and articulate their concerns, as well as providing the appropriate focus and constraints upon the involved parties to ensure the potential for mission success. Once again, the appropriate third party, by structure and legislation, is the NSC.

The third critical area necessary for providing the potential for mission success is for the designated operational element to have the appropriate authority to conduct operations. The largest constraint upon this area is time. Most of the targets and operations necessary for this mission will be based upon fleeting opportunities due to the transitory nature of the target set. To provide the potential for success, the element conducting the operation must be able to rapidly receive approval for the operation. This requires a streamlined approval process with minimal coordination outside a single approval channel. By legislation, the DOD requires an execution order from the president or SECDEF (with presidential approval). This creates the potential for significant delay, however, if the approval is not received prior to the opportunity to conduct the operation. It becomes even more difficult if the DOD is not already the supported, or lead, federal

agency for the mission. Each of these initiates and requires interagency coordination, which delays the approval process. The execution order is required; the question then becomes what constraints are placed upon the action to ensure minimal risk to other national interests.

This can most easily be accomplished with the routine management of associated risks and mission milestones through a third party. In this case, mission approval through an order would be given for the executing element. Potential second and third order effects could then be discussed with the third party, and constraints to maintain higher national intent and interests can be validated and adjusted. The third party could then manage the requirements that would need to be met prior to the initiation of operations (positive identification, host nation notification, force protection adjustment, intelligence asset allocation, and others). Once again, this third party is logically the NSC.

There are two overarching themes in this analysis. The first is the requirement to establish a priority of effort and identify the lead federal agency for each effort, and the second is the role of the NSC in this process. The first requirement is the easier to accomplish.

Priorities of effort, as well as roles and responsibilities of the various executive elements, can easily be articulated and clarified through presidential policy. This is routinely accomplished through executive orders but can also take the form of presidential findings and military orders. Each of these has reporting requirements and carry their own approval and coordination requirements, but can accomplish the necessary objective of focusing the executive agencies. The most comprehensive and

readily accessible method, however, is the executive order. The role of the NSC can also be clarified in this manner.

The *National Security Act of 1947* establishes the NSC to act as the primary coordinator for interagency actions and disputes. Specifically, *USC Title 50*, sec. 402 states that

The function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.

This legislation specifically identifies the NSC as the element that is responsible for coordinating interagency actions. It also restricts the NSC from conducting those operations and relegates it specifically to an advisory and coordination role. As such, the approval to conduct operations would have to already exist, and specific authorities and priorities would already need to be in place. The NSC would then be able to accomplish their specified tasks of coordinating between governmental elements and addressing concerns and challenges as they arise. This role would need to be clarified in policy prior to execution for it to have the potential for success.

Recommendation

To resolve the issues inherent in the strategic operating environment, a presidential policy should be articulated that does several things. First, it should identify the priority of effort for the executive elements. Second, an executive department or agency should clearly be identified as the lead for each effort. Third, the role of the NSC in mediating disputes, coordinating limited assets (specifically intelligence), and mitigating risks should be articulated. Lastly, there should be a process established to

allow for routine review to ensure the process is working, stated national interests and efforts have not changed in priority or scope, and that outstanding issues have been resolved.

Priority of Effort: This policy should clearly identify the priority of effort for the executive branch. Although it is expected that not all things will be addressed, the largest issues can and should be prioritized. Specifically, the issues such as homeland security, economic revitalization, the stability and continued development of countries such as Iraq and Afghanistan, the hunt for transnational terrorists, and the engagement and reform of rogue nations (such as North Korea, Syria, and Iran) must be prioritized. National intent for each of these issues should be clearly articulated so that the disparate elements of the executive branch can place the appropriate emphasis and assets to meet the desired end-state.

Lead Federal Agency: For each of the priorities listed in this order, a single executive department or agency must be identified as the one responsible to address it. In this role, that agency determines the methods, appropriate levels of risk, timelines, and required support from the other agencies in order to accomplish the specified national intent. The other elements of the executive branch would then be tasked to support that effort according to the priority established in the order.

Role of the NSC: The role of the NSC must be articulated in this order to ensure the various elements of the executive branch understand their responsibilities, as well as the responsibilities of the NSC. The NSC would mediate conflicts between the agencies as it pertains to asset allocation, as well as manage the day-to-day prioritization of effort and support. In addition, the NSC would be responsible for synchronizing efforts to

ensure a synergistic effect where possible. Issues requiring additional authorities or changes in priority would be addressed directly to the president through the NSC. Lastly, the NSC would receive the responsibility to monitor and ensure that higher national interests are being addressed and satisfied. This portion is critical in order to ensure that the interagency process is appropriately managed to ensure the potential for mission success.

Relevance and Efficacy: The order should establish a process to ensure that each element of the national security apparatus is participating appropriately and complying with the dictums of the order. This review process would also allow for a revalidation of the priority of effort and a venue for resolving open issues. The failure of implementation of PDD 56 clearly demonstrates a need for this type of process (Scarborough, 1999).

This order would establish the framework, as well as the expectation, for better interagency cooperation, and would clearly articulate a method for resolving interagency conflict over mission sets and priorities. All the members of the executive branch would then understand their individual responsibilities, and could pursue national objectives collectively. The inherent challenge in this order would be to determine which agency received the lead for which effort, and the determination of the level of cooperation necessary for each effort. Assuming that DOD was identified the lead federal agency for man-hunting operations, this order would establish the potential for success. Ideally, however, this order would eliminate the need for the DOD to conduct unilateral operations. Instead, a managed process, with the DOD potentially in the lead, would exist that would ensure a true interagency process, synergistically executed to meet national intent as articulated in the order, and would allow the simultaneous application of all the

elements of national power to meet specified objectives. The first step, however, is to clearly identify and prioritize the national effort and to assign a lead for each effort.

GLOSSARY

CONUS. Continental United States. Can also refer to Contiguous United States.

DIA. Defense Intelligence Agency

EO. Executive Order. A written declaration of policy issued by the President.

Intelligence community. The intelligence architecture identified in *United States Code* that includes the CIA, DIA, NRO, NIMA(NGA), NSA, and others. Specific delineation available through *USC Title 50 Sec. 401a*.

JCS. Joint Chiefs of Staff. Commonly refers to the staff legislated to support the actual Joint Chiefs of Staff.

JMIP. Joint Military Intelligence Program. The military intelligence program designed and funded to meet military intelligence requirements. Coordinated and managed by the SECDEF with oversight and concurrence by the DCI.

NFIP. National Foreign Intelligence Program. The national intelligence program designed and funded to meet national intelligence requirements. Coordinated and managed by the DCI.

NGA. National Geospatial Intelligence Agency

NIMA. National Imagery and Mapping Agency. Now called the NGA

PDD. Presidential Decision Directive. A written form of policy issued by the President. It is often considered a form of Executive Order.

USC. United States Code. The body of law approved by the national legislature that governs the United States.

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